UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOYCE ROBINSON, plaintiff v. CONSOLIDATED RAIL CORPORATION (a Pennsylvania Corporation licensed to do Business in New Jersey), NORFOLK SOUTHERN CORP., NORFOLK SOUTHERN RAILROAD CORP. , JOHN DOES (1-10) AND ABC CORPORATION (1-10) Defendant.	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CIVIL ACTION NO.: 07-2687(FSH)(PS)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, ALTERNATIVELY, TO TRANSFER

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PRELIMINARY STATEMENT

Plaintiff, Joyce Robinson, submits this memorandum of law in opposition to defendants' motion to dismiss, or alternatively, to transfer the Complaint filed by plaintiff.

Plaintiff filed this complaint again defendants as a result of the dangerous and hazardous work environment she was forced to work in during her employment with defendants. Plaintiff was discriminated against, based on her race and gender, which also led to her wrongful termination and all other counts alleged in the complaint by plaintiff.

Defendant's legal arguments in favor of the dismissal of the entire suit are defective, as will be shown throughout this memorandum.

ARGUMENT

1. PLAINTIFF AGREES TO TRANSFER THE CASE TO THE MIDDLE DISTRICT OF PENNSYLVANIA

Plaintiff initially filed this lawsuit in New Jersey. Through this motion, defendant asks that in the alternative to dismissal, that the case be transferred to the Middle District of Pennsylvania. After consulting with counsel, plaintiff agrees to the transfer of the case to the Middle District of Pennsylvania, as that is the Court that is most appropriate under 28 U.S.C. 1391(b).

II. THIS COURT SHOULD NOT DISMISS ANY OF THE COUNTS OF THE COMPLAINT AS THEY ALL HAVE MERIT

Dismissal of any of the count of this Complaint is wholly inappropriate. As the rest of this memorandum will show, each Count of plaintiffs Complaint has merit and all of defendants' arguments for dismissal are fatally defective.

A. Plaintiff's FELA count is not time barred and does allege sufficient facts to support the claim.

Defendants claim that plaintiff's claim must be dismissed because the statute of limitations on a FELA claim had passed by the time plaintiff filed the Complaint on April 4, 2007. It is defendants' contention that the statute of limitations began to run on March 19, 2004, as that is the last specific incident mentioned in plaintiff's complaint. This date, however, is completely incorrect. FELA provides that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.” 45 U.S.C. 55. The question that becomes determinative, therefore, is when does the cause of action accrue? The Courts have come to a clear answer on this subject. A claim accrues when the plaintiff should reasonably have been aware of injury and causation. *Townley v. Norfolk & Western Railway Co.,* 690 F. Supp. 1513 (S.D. W.VA 1988); *Jones v. Maine Central Railway Co.,* 690 F. Supp. 73 (D. Me. 1988). *Wherman v. U.S.,* 830 F.2nd 1480 (8th Cir. 1987); *Nemmers v. U.S.* 795 F.2d 628 (7th Cir. 1986). Occupational disease or illness statute of limitations begins to run when plaintiff becomes aware of disease or illness and its causes. *Urie v. Thompson,* 337 U.S. 163 (1949); *Kichline v. Consolidated Rail Corp.* 800 F.2d 356 (3rd Cir. 1986).

Under this case law, plaintiff absolutely satisfies the statute of limitations. Plaintiff’s claim accrued when plaintiff became aware of the injury and/or illness she had suffered. While the specific instances of harassment and discrimination that were pleaded ended on March 19, 2004, plaintiff did not become aware of her injury until she had a nervous breakdown. Plaintiff did not recognize the causation of this injury until late 2005 when she recognized that it was a direct consequence of the defendant's wrongful workplace conduct. (see plaintiff's certification on her discovery rule knowledge of her injuries and claims). Prior to this time, she had no reason to know that her injuries had been caused by the workplace conditions she was forced to work under.

Defendants further claim that plaintiff's FELA claim fails because she does not allege sufficient facts to support the claim. As stated by defendants, FELA provides the exclusive remedy for a railroad employee injured as a result of her employer's negligence. *Wabash R.R. Co. v. Hayes,* 234 U.S. 86, 89 (1914). A plaintiff must prove that the railroad was negligent. *Tennant v. Peoria and Pekin Union Railway Co.,* 321 U.S. 29 (1944). Defendants claim that plaintiff has not alleged that her emotional distress was a result of the negligence of the defendant railroad. This is completely incorrect. Plaintiff's entire FELA count to her Complaint is based in negligence. (Complaint attached herein as exhibit C). Plaintiff states in her Complaint that "her injuries arose out of the dangerous and hazardous work place conditions which existed throughout her employment with Norfolk, whose supervisors knew or had reason to know, or should have known, of the dangerous and hazardous types of conditions that the Plaintiff was being subjected to while under the employment of said railroad." This paragraph is completely based in negligence, as under FELA, the railroad employer is required to provide its employees with a reasonably safe place to work; failure to comply with this nondelegable duty constitutes negligence. *Duncan v. St. Louis S.F.R. Co.,* 480 F2d 79 (CA 8 Mo. 1973). This is essentially identical to what plaintiff pled in the Complaint. Defendants' argument that plaintiff did not plead negligence is therefore completely incorrect, and the FELA count should not be dismissed.

B. Counts Three, Four and Five should not be dismissed because it would be premature to do so and they are not preempted by the Railway Labor Act.

Defendants' move to dismiss counts three, four and five of Plaintiff's complaint for lack of subject matter jurisdiction, stating that because plaintiff was a railroad employee subject to a collective bargaining agreement, she was bound to arbitrate her termination grievance before the National Railroad Adjustment Board or a similar adjustment board agreed to by the parties, and she is not allowed to grieve her termination anew in this Court.

Plaintiff believes that dismissing these counts would be premature. It is too early on in this case to be able to make a definite assertion that these claims are preempted by the Railway Labor Act. No discovery has been conducted in this case that would aid Plaintiff in being able to show why this claim is not preempted as the defendants would have the Court believe. This discovery is necessary and indispensable before any determination on these three counts can be made. The Court, in *FTC v. Chinery*, 2007 U.S. Dist. LEXIS 48597,(D. N.J. 2007) stated,

> The Court agrees with the FTC that Defendant's motion for summary judgment should be denied as premature because the parties have not engaged in formal discovery in this matter. The parties are directed to conduct discovery as outlined in the FTC's Rule 56(f) submission. A motion for summary judgment may be filed at such time as discovery has concluded and this Court is presented with a complete record of these proceedings. The parties are directed to

> confer with the Magistrate Judge in order to establish a discovery plan. Consequently, the motion for summary judgment is denied without prejudice and the parties are directed to conduct discovery before refiling, if so desired.

Therefore, while this was a motion for summary judgment, the Court recognized the need for discovery before dismissing the case. It is still possible that through discovery, the preemption argument will not be a valid one.

Furthermore, irrespective of the grievance process and the Railway Labor Act, the acts performed against the plaintiff at her place of work are clearly distinguishable from any form of redress or relief she would seek under the Collective Bargaining Agreement. The acts that were performed against plaintiff were clearly beyond the realm of human experience, as nobody should be forced to endure was she had to endure. These are actions that should be heard by the Court and are actually inappropriate for a Board to decide on. Therefore, Counts three, four and five should not be dismissed.

C. Both the Intentional and Negligent infliction of emotional distress claims are not time barred

Defendants argue that both plaintiff’s intentional and negligent infliction of emotional distress claim is barred by the statute of limitations. As stated in the arguments above, an occupational disease or illness statute of limitations does not begin to run until the plaintiff becomes aware of the disease or illness and its cause. *Urie v. Thompson,* 337 U.S. 163(1949); *Kichline v. Consolidated Rail Corp,* 800 F.2d 356(3d Cir. 1986). Plaintiff did not actually become aware of her injury under which these causes of action are being brought until a date within the two year statute of limitations. Therefore, both of these claims are timely and should not be dismissed.

D. The Negligent infliction of emotional distress claim should not be dismissed because FELA does not provide the exclusive remedy for her injuries that form the basis for her claim.

Defendants believe that plaintiff’s negligent infliction of emotional distress claim is preempted by FELA. This is not correct. In *Conrail v. Gottshall*, 114 S. Ct. 2396(1994), the Court, while discussing FELA, stated “while the statute may have been primarily focused on physical injury, it refers simply to "injury," which may encompass both physical and emotional injury. We believe that allowing recovery for negligently inflicted emotional injury as provided for under the zone of danger test best harmonizes these considerations. Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." Therefore, plaintiff is allowed to bring a claim for negligent infliction of emotional distress. She was well within the zone of danger, as she was the actual target of the actions which caused her emotional distress. She was certainly in fear of physical injury to herself, as she saw that the people harassing her and vandalizing her property were willing to go to extreme lengths to hurt her. For these reasons, plaintiffs negligent infliction of emotional distress claim should not be dismissed.

E. Plaintiff's NJLAD Claim will be dismissed because of the transfer of venue.

Plaintiff agrees that her NJLAD claim will be dismissed because the case will be heard in the Middle District of Pennsylvania. Therefore, plaintiff will not oppose defendants' arguments as to other reasons why the count should be dismissed. Plaintiff reserves its right to amend her complaint to plead the Pennsylvania equivalent of same.

F. Plaintiff's Title VII claim does not fail as Plaintiff did exhaust her administrative remedies.

Defendants argue that plaintiff's Counts three and nine must fail because they are both Title VII claims and plaintiff has failed to exhaust her administrative remedies. Defendants base this assertion on plaintiff's failure to receive a right to sue letter from the agency which she filed her initial grievance with. Plaintiff has in fact, received a right to sue letter. (right to sue letter previously attached herein as exhibit B).

The Court should further note that the Pennsylvania Human Relations Commission herein after referred to as "PHRC" either has or is about to memorialize in writing a probable cause finding in "PHRC" case number 200500586, from the Harrisburg, Pennsylvania Office against defendant Norfolk Southern in favor of plaintiff.

The "PHRC" will seek to join and/or intervene in the within action once same is moved to the Middle District of Pennsylvania, Harrisburg.

Not only has the Plaintiff exhausted her administrative remedies, but there is now a positive finding of retaliation and discrimination by the defendant against the plaintiff.

Therefore, defendants’ argument on this matter is defeated and neither of these counts should be dismissed.

III. CLAIMS AGAINST CONRAIL ARE BEING DISMISSED

Plaintiff has agreed to release Conrail from this lawsuit.

CONCLUSION

For all the reasons stated above, the Complaint not be dismissed. Only plaintiff’s NJLAD claim should be dismissed as the case will be heard in the Middle District of Pennsylvania.

Respectfully Submitted,

Dated: August 28, 2007 S//Richard S. Mazawey, Esq.

CERTIFICATION OF FILING & SERVICE

I certify that the original of the within Opposition to Defendants' Motion to dismiss and Certification have been filed with the Clerk of the United States District Court, District of New Jersey and that copies have been served upon all counsel of record by regular mail.

I further certify that a copy of the within Opposition to Defendants' Motion to dismiss and Certification have been served within the time prescribed by the Rules of Court.

Dated: August 28, 2007 S//RICHARD S. MAZAWEY, ESQ.